

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 23, 2008

WILLIE JOE FRAZIER v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Wayne County
No. 14021 Stella Hargrove, Judge**

No. M2007-00525-CCA-R3-CO - Filed September 3, 2008

Petitioner, Willie Joe Frazier, appeals the trial court's summary dismissal of his petition for writ of habeas corpus. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Willie Joe Frazier, Clifton, Tennessee, *Pro Se*.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General, and T. Michel Bottoms, District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Petitioner was indicted in 1980 for multiple counts of armed robbery and related assaults as a result of his participation in the robbery of a number of employees and customers of a pharmacy in Lewisburg. Petitioner escaped from jail prior to his scheduled trial and was not apprehended until 2002. Following a jury trial, Petitioner was convicted in 2003 of two counts of malicious shooting, one count of assault with intent to commit voluntary manslaughter, one count of assault with intent to commit first degree murder, one count of aggravated assault, six counts of armed robbery, and two counts of assault with intent to commit robbery.

Petitioner was sentenced in accordance with the law as it existed at the time he committed the offenses. See T.C.A. § 40-35-117(c). The jury sentenced Petitioner to indeterminate sentences for all of the convictions except the six armed robberies, for which the jury fixed sentences of life imprisonment. The trial court grouped the thirteen convictions into three categories for purposes of consecutive sentencing, resulting in six concurrent life sentences consecutive to concurrent sentences

of eight to twenty years and consecutive to a ten to twenty-five year sentence. This resulted in an effective sentence of life plus eighteen to forty-five years in the Department of Correction. See State v. Willie Joe Frazier, No. M2003-03014-CCA-R3-CD, 2005 WL 1798874 (Tenn. Crim. App., at Nashville, July 26, 2005), perm. to appeal den. (Tenn. Dec. 19, 2005). On appeal, a panel of this Court merged Petitioner's conviction for assault with the intent to commit voluntary manslaughter of Judy Watson into his conviction for malicious shooting; reversed Petitioner's convictions for assault with the intent to commit robbery of Ollie Bagley and Goldie Crabtree and remanded for entry of a judgment of conviction for the lesser include offense of aggravated assault of Ollie Bagley and Goldie Crabtree with the minimum sentence of not less than two nor more than ten years for each conviction with the State's consent; and affirmed the imposition of consecutive sentencing which resulted in no change to Petitioner's initially imposed aggregate sentence. Id., 2005 WL 1798874, at *8.

Petitioner filed a petition for writ of habeas corpus arguing that his sentences for his armed robbery convictions are illegal and void because he should have been sentenced pursuant to the 1989 Sentencing Act. The trial court denied Petitioner habeas corpus relief without an evidentiary hearing.

II. Standard of Review

The right to habeas corpus relief is available "only when 'it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007) (quoting Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993)). In contrast to a post-conviction petition, a habeas corpus petition is used to challenge void and not merely voidable judgments. Id. at 255-56. A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish its invalidity. Id. at 256; Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). A void judgment "is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment." Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999); Dykes, 978 S.W.2d at 529.

A petitioner bears the burden of proving a void judgment or illegal confinement by a preponderance of the evidence. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). A trial court may summarily dismiss a petition for writ of habeas corpus without the appointment of counsel and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. See Summers, 212 S.W.3d at 260; Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).

The determination of whether habeas corpus relief should be granted is a question of law. Summers, 212 S.W.3d at 255; Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000). Therefore, our review is de novo with no presumption of correctness given to the findings and conclusions of the lower court. Summers, 212 S.W.3d at 255; State v. Livingston, 197 S.W.3d 710, 712 (Tenn. 2006).

III. Analysis

In his appeal, Petitioner relies on our supreme court's decision in Dixon v. Holland, 70 S.W.3d 33 (Tenn. 2002) as support for his contention that his life sentences are void. Petitioner argues that former Tennessee Code Annotated section 39-114 [later replaced by Tennessee Code Annotated section 39-1-105 (1982) and now codified at Tennessee Code Annotated section 39-11-112] was in effect at the time that he committed the offenses. Section 39-114 provided as follows:

Repealed or amended laws-Application in prosecution for offense.-Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act being repealed or amended, committed while such statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. In the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act. [Acts 1968 ch. 513, § 1]

Petitioner was convicted of six counts of armed robbery for which he was sentenced to life imprisonment. T.C.A. § 39-3901 (repealed 1989). Under the 1989 Sentencing Act, robbery by use of a deadly weapon is a Class B felony which carries a sentence of between eight and twelve years for a Range I, standard offender. Because this is a lesser sentence than that imposed under the pre-1989 Sentencing Act, Petitioner argues that former Section 39-114 mandates that he be sentenced under the 1989 Sentencing Act, and that his life sentences are therefore illegal and void.

The State argues first that the trial court did not err in summarily dismissing Petitioner's request for habeas corpus relief because Petitioner failed to attach copies of his judgments of conviction for armed robbery. See T.C.A. § 29-21-107(b)(2). Alternatively, the State argues that Petitioner has not shown that his sentences for his armed robbery convictions are illegal and void.

We observe initially that after the State filed a Motion to Dismiss alleging procedural defects in the petition, Petitioner filed a Motion to Supplement the Record on August 1, 2006, to include his six judgments of conviction for his armed robbery offenses. Regardless, we find that Petitioner has failed to state a ground for which habeas corpus relief is available.

In Dixon v. Holland, the defendant was tried and convicted in 1981 for kidnapping for ransom under Tennessee Code Annotated section 39-2603 (1975) and sentenced to life without possibility of parole. Dixon, 70 S.W.3d at 36. After the commission of the offenses in 1978 but before the defendant was tried and convicted in 1981, section 39-2603 was amended in 1979 to classify the offense of aggravated kidnapping as a Class X felony which carried a sentence of twenty years to life with possibility of parole. Id. at 36-37. The defendant argued that he should have been sentenced under section 39-2603 as it existed in 1979 because of the criminal law savings statute, Tennessee Code Annotated section 39-114. Id. at 37. The supreme court agreed, concluding that the savings statute provided that in the event of a subsequent amendment of the convicting statute,

defendants were to be tried under the law as it existed at the time of the commission of the offense, but sentenced pursuant to the statute with the lesser penalty. Id. at 38.

As the State points out in its brief, however, former section 39-114 was in effect at the time that the defendant in Dixon was tried and convicted for the kidnapping offense. In the case sub judice, however, former section 39-114 had been replaced in 1982 and again in 1989 and was no longer law at the time Petitioner was tried and convicted in 2003. See T.C.A. §40-35-112(a) (1982) (repealed 1989); T.C.A. § 40-35-117(c).

Both the 1982 and the 1989 sentencing laws provide that crimes committed before July 1, 1982, are punishable by the applicable pre-July 1, 1982 sentencing law. See T.C.A. § 40-35-112(a) (repealed 1989); T.C.A. § 40-35-117(c); see also T.C.A. § 40-35-117, Sentencing Comm'n Comments (offenses committed prior to July 1, 1982 “were treated under the very different indeterminate jury sentencing structure”). Furthermore, this court has held that crimes committed prior to July 1, 1982, are exclusively punished via jury sentencing under the applicable prior law. State v. Turner, 919 S.W.2d 346, 361 (Tenn. Crim. App. 1995); State v. Harris, 678 S.W.2d 473, 476 (Tenn. Crim. App. 1984); State v. Carter, 669 S.W.2d 707, 708 (Tenn. Crim. App. 1984).

Petitioner committed the offenses of armed robbery in 1980. Tennessee Code Annotated section 40-35-117(c) states, “For all persons who committed crimes prior to July 1, 1982, prior law shall apply and remain in full force and effect in every respect, including, but not limited to, sentencing, parole and probation.” Petitioner’s judgments of conviction for armed robbery show that Petitioner was tried and sentenced under the law as it existed in 1980. Moreover, Petitioner’s sentences were authorized by the statutory sentencing provisions applicable for crimes committed in 1980. See T.C.A. § 39-3901 (repealed 1989). Thus, we conclude that Petitioner’s sentences for his armed robbery convictions are not facially invalid, and Petitioner has failed to establish that he is entitled to habeas corpus relief on this ground.

Alternatively, Petitioner appears to argue that the enactment of Tennessee Code Annotated section 40-35-117(c), which replaced former section 39-114, was a violation of the Ex Post Facto Clause. In general, the Ex Post Facto Clause bars the application of laws, rules, or policies that change the punishment and inflict greater punishment than the law annexed to the crime when it was committed. Johnson v. United States, 529 U.S. 694, 699, 120 S. Ct. 1795, 1800, 146 L. Ed. 2d 727 (2000). However, because Petitioner was not sentenced pursuant to provisions enacted after he committed the offenses, there are no ex post facto concerns. See State v. Ricci, 914 S.W.2d 475, 480 (Tenn. 1996). Petitioner was properly sentenced under the version of the Sentencing Act in effect at the time of his crime.

We note that on appeal, Petitioner has also argued additional grounds for habeas corpus relief which were not presented to the habeas court, including alleged Blakely violations and sentencing deficiencies. See Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (prohibiting the enhancement of a sentence based upon considerations that have neither been admitted by a defendant nor determined by a jury beyond a reasonable doubt). Issues that were not presented to the habeas

court will not be considered for the first time on appeal. See Turner, 919 S.W.2d at 356 (observing that issues not raised or litigated in the trial court are waived). Therefore, these issues are deemed waived.

CONCLUSION

After a thorough review of the record, we affirm the trial court's denial of the petition for habeas corpus relief.

THOMAS T. WOODALL, JUDGE